



Office of the  
Ohio Consumers' Counsel

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May 2, 1996

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Office of the Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

***Re: CC Docket No. 96-61; Separation Requirements & Geographic Averaging***

Dear Secretary:

Enclosed please find the original and eleven (11) copies of the Office of the Ohio Consumers' Counsel's Reply Comments to be filed in the above referenced proceeding.

Please date-stamp and return the additional copy in the pre-addressed, postage prepaid envelope to acknowledge receipt.

Sincerely,

David C. Bergmann  
Assistant Consumers' Counsel

DCB/pjm

Enclosure

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**Before The  
FEDERAL COMMUNICATIONS COMMISSION**

In the Matter of )  
 )  
Policy and Rules Concerning the )  
Interstate, Interexchange Marketplace. )  
 )  
Implementation of Section 254(g) of the )  
Communications Act of 1934, as amended. )

CC Docket No. 96-61

MAY 3 1996  
FCC MAIL ROOM

**SUMMARY OF  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S  
REPLY COMMENTS  
ON SEPARATIONS REQUIREMENTS  
AND GEOGRAPHIC AVERAGING**

The Office of the Ohio Consumers' Counsel offers its reply to a select group of the comments filed on Sections V and VI of the March 25, 1996 Notice of Proposed Rulemaking in this docket.

On Section V, Separations Requirements for Independent Local Exchange Carrier and Bell Operating Company Provision of "Out of Region" Interstate, Interexchange Services, OCC takes a position midway between two extremes: First, there are the arguments raised in the comments of interexchange carriers, who propose that Regional Bell Operating Companies (RBOCs) should be deemed dominant in out-of-region services even with separations, and that the separations should not be relaxed for independent local exchange carriers (LECs). The opposite position is taken by the United States Telephone Association, which argues that the separations requirements should be eliminated for all LECs, including RBOCs.

OCC proposes the elimination of separations requirements for small and medium sized LECs lacking a national presence, unless they have received an exemption from or suspension of the interconnection requirements of the 1996 Act. Separations requirements should be maintained for medium sized and large independent LECs with a national presence and for RBOCs in order for them to be deemed non-dominant in out-of-region interexchange service. Independent LECs and RBOCs should be deemed dominant for in-region interexchange service, even with separations.

On Section VI, Rate Averaging and Integration Requirements of 1996 Act, OCC submits that distance sensitive rates, non-discriminatory contracts, and temporary promotions would not violate the interexchange rate averaging requirements of the 1996 Act. However, the proposals by the Competitive Telecommunications Association (CompTel) that would allow a service to be offered in only portions of an interexchange carrier's territory, and that only a standard service package need be offered at averaged rates, would violate the 1996 Act. Equally, AT&T's proposals that averaging would only apply to dominant carriers, and that exceptions to averaging would be allowed in specified competitive circumstances, would effectively eliminate the 1996 Act's averaging requirement.

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**THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S  
REPLY COMMENTS  
ON SEPARATIONS REQUIREMENTS  
AND GEOGRAPHIC RATE AVERAGING**

**I. INTRODUCTION**

The burdens placed on the Federal Communications Commission by the Telecommunications Act of 1996 (1996 Act)<sup>1</sup> are tremendous. The press noted that "50 to 80" rulemakings would be required, within a very short timeframe.<sup>2</sup> This has caused the Commission to impose short timelines on the rulemakings, with strict page limits for parties' comments.

The issues at stake in all of the proceedings are vital to the future of telecommunications in this country, and are of interest to numerous parties, including the Office of the Ohio Consumers' Counsel (OCC). But this necessarily difficult process has,

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<sup>1</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), *to be codified at* 47 U.S.C. §§ 151 *et seq.* In these Comments, OCC has adopted the Commission's convention for referring to the 1996 Act. *See* NPRM at ¶ 1, n. 3.

<sup>2</sup> "Law Expected to Spur Consolidation, Service Bundling; Focus Now Shifts from Congress to FCC, States," *Telecommunications Reports* (February 12, 1996) at 5.

unfortunately, placed burdens on all parties in addition to the Commission. As a result of this burden, OCC has not reviewed and responded to all of the initial comments filed. Instead, OCC has selected what we hope to be a representative sample of the commenters.<sup>3</sup> OCC has also chosen to focus on only two of the numerous issues presented in the initial comments in this docket.

OCC replies herein to the comments filed by AT&T Corporation (AT&T); Competitive Telecommunications Association (CompTel); GTE Service Corporation (GTE); MCI Telecommunications Corporation (MCI); National Association of Regulatory Utility Commissioners (NARUC); the Public Utilities Commission of Ohio (PUCO); and the United States Telephone Association (USTA)

The two issues OCC will address here are the degree of separations requirements that should be imposed on out-of-system interexchange service operations of the LECs, and the extent of geographic interexchange rate deaveraging allowed by the 1996 Act.

## **II. SEPARATIONS**

In OCC's initial comments, a range of separations requirements were proposed for incumbent local exchange carriers (LECs) seeking non-dominant interexchange carrier status in this transitional period. For the Regional Bell Operating Companies (RBOCs), OCC urged the Commission to retain the separations requirements that it very recently concluded were appropriate, *In the Matter of Bell Operating Company Provision of Out*

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<sup>3</sup> Just as, in the Commission's universal service docket, *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, OCC purchased, received and reviewed only 50-some of the almost 250 comments filed.

*of Region Interstate, Interexchange Services* (rel. February 14, 1996) (Out of Region NPRM) at ¶ 1. For independent companies, OCC urged the same separations requirement for those small and medium-sized LECs who obtained exemptions from or suspensions and modifications of the 1996 Act's interconnection requirements. OCC viewed the issue of separations requirements for medium-sized independents as an open question. Finally, OCC doubted whether a small LEC facing local competition would be able to engage in behavior favoring its interchange operations, and urged that no separations requirements apply in that situation.

The comments reviewed by OCC confirm our initial views, and answer the open question. The comments range from the views of MCI and AT&T that all LECs should be subject to separations requirements, and that RBOCs should *not* be accorded non-dominant status even for out-of-region interexchange operations (*see MCI* at 11-25; *AT&T* at 27<sup>4</sup>) to the view of USTA that LECs should be subject to no separations requirements at all. USTA at 8. The public interest lies somewhere in between the positions of these representatives of competitive interests.

MCI bases its view on "the BOCs' continuing local bottleneck control and the ability to apply that control out of region in the interexchange market...." MCI at 10. MCI also asserts that LECs in general possess those same anti-competitive abilities. *Id.*

MCI states that "[n]othing has occurred recently that creates any particular urgency as to the treatment of LEC out-of-region interexchange services, and the

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<sup>4</sup> AT&T also proposes a prohibition on joint marketing or sharing of information between LEC interexchange affiliates and their local operations. AT&T at 27. Such a prohibition might be appropriate for medium to large LECs, but is probably not necessary for small LECs.

separations requirements are not particularly burdensome.” MCI at 12; see also CompTel at 5. However, those requirements were imposed in 1984, and much *has* happened since then. Local exchange competition is now a real possibility, and the 1996 Act was enacted. With the advent of local exchange competition, large existing interexchange carriers (like MCI) will be getting into the local exchange business, subjecting current monopoly small independent LECs to competitive pressure. A small LEC facing such pressure should be entitled to engage in other businesses such as long-distance without the burden of separations requirements. On the other hand, if the LEC obtains exemption from local competition, the possibility still remains of the LEC’s local operations being used to subsidize the interexchange competitive operations, and separations requirements are appropriate. OCC doubts whether the minimal reach of small LECs’ local dominance could “easily be leveraged into out-of-region interexchange services....” MCI at 13.

On the other hand, medium-sized LECs may be more able to use such leverage. Companies of national scope such as ALLTEL, Century Telephone, and GTE, although having no overwhelming presence in any one state, may be able to use their interstate reach to disadvantage their local service, where they are not likely to see much competition in the near term. GTE’s position on this issue (GTE at 7) deals only with possible disadvantage to the interexchange market, and ignores GTE’s dominance in its own local service market

MCI takes the position that RBOC out-of-region interexchange services should be deemed dominant even if separated. MCI at 26. CompTel would impose a set of five additional conditions on RBOCs’ provision of out-of-region services for the RBOCs to be

treated as nondominant. CompTel at 4-5. If AT&T is non-dominant (AT&T Nondominance Order, 1995 FCC Lexis 6877), there is little reason to assume dominance for the RBOCs in *out-of region* interexchange services

The situation is different for RBOC in-region interexchange (intraLATA and interLATA) services, as it is for such services offered by large independent LECs. GTE states (at 7) that “[t]here is no possibility that a GTE telephone company ... could substantially influence the interexchange market when it enters the market with a zero market share.” A company with a 100% market share in its local market would have ample opportunity to influence the interexchange market *in its territory*.

USTA would eliminate the separations requirements for all LECs. USTA at 9. GTE takes up the banner for the independent LECs. GTE at 6-7. USTA clearly states the dangers that led to the requirements: “[T]hese requirements are apparently intended as a prospective measure to prevent essentially one type of anti-competitive harm: below cost or predatory pricing of interchange services subsidized by revenues from local exchange or market services where LECs have market power.” *Id.* USTA also notes the potential that “a LEC could somehow discriminate in the quality of interconnection it provides to a competitor, relative to the interconnection it provides itself.” *Id.*, n. 17.

USTA’s only defense of its position is the effectively unsupported statement that “ensuring competitive fairness can be achieved through existing regulations and market forces without eliminating the efficiencies of integrated operations.” *Id.* at 7. The market power of the RBOCs in their territories is much more substantial than any of the independent LECs, given the sheer number of customers served by the RBOCs within



their regions. Thus there is substantial doubt about whether the existing regulations will be adequate<sup>5</sup> absent the separations requirement.

OCC thus proposes a range of controls on LECs in keeping with the LECs likely market power, ability to engage in anti-competitive behavior, and ability to disadvantage local exchange operations. Rural telephone carriers (Sec. 153(47)) should be subject to separations requirements only while they have an exemption under Sec. 251(f)(1)(A). Rural carriers (Sec. 251(f)(2)) without a national presence should be subject to separations requirements for interexchange operations to the extent they receive suspension or modification of Sec. 251(b) or (c). Rural carriers with a national presence and other independent LECs should continue to be subject to separations requirements.<sup>6</sup> RBOCs should be subject to separations requirements in order to be treated as non-dominant for out-of-region operations. Finally, RBOCs should be treated as dominant carriers for in-region interexchange operations.

### **III. DEAVERAGING**

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<sup>5</sup> Indeed, one reason for the proposed combination of NYNEX and Bell Atlantic would be their control of the interexchange market in their combined territory. "Nynex and Bell Atlantic Agree to Merger," *New York Times* (April 22, 1996) at A1.

<sup>6</sup> OCC commends to the Commission's attention the clarified and additional requirements proposed by the PUCO, where separations requirements are to be required. PUCO at 3-4

MCI argues that geographic averaging can be economically inefficient. MCI at 27. This may or may not be true. However, “efficiency” is not the only concern of the 1996 Act. Instead, the geographic averaging in the 1996 Act promotes *equity*.

USTA supports geographic averaging of toll rates. USTA at 2.<sup>7</sup> USTA notes certain exceptions (at 3), those being contracts and other limited situations such as AT&T Tariff 12. *See also* AT&T at 35. OCC notes that the Joint Explanatory Statement indicates that such exceptions could be offered using the forbearance provisions of Section 10 of the 1996 Act. Joint Explanatory Statement at 18. Such a determination by the Commission would require Section 10 findings to be made.

CompTel states (at 6) that Congress intended to codify existing FCC policies. This is not so: the statutory requirement is significantly broader than FCC’s policies. For instance, Congress did not focus only on dominant carriers’ rates, as CompTel implies (at 6-7).<sup>8</sup>

CompTel proposes exceptions to geographic averaging, stating that distance-sensitive rates, customer-specific contracts, and promotions or optional calling plans would be allowed. *See also* AT&T at 35-37. Distance sensitive rates clearly do not violate any principle of geographic averaging as that notion is included in Section 254(g). *Non-discriminatory* contracts would not violate averaging, unless those contracts became

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<sup>7</sup> It is perhaps ironic that USTA so fervently supports geographic toll rate averaging when many of its members (at least in Ohio) have proposed geographic deaveraging of local services.

<sup>8</sup> AT&T’s attempt to insert “Commission” into the Joint Explanatory Statement, quoting it as stating that Section 254(g) “is intended to incorporate the [Commission’s] policies of rate averaging and deaveraging” (AT&T at 32) ignores the deletion of the reference to “existing” policies from the Senate report.

so general and non-customer-specific as to swallow the averaging principle. Equally, promotions or optional calling plans would not violate the averaging requirement unless they became permanent but not ubiquitous. *See* OCC Initial Comments (April 19, 1996) at 5. AT&T acknowledges this by referring to promotions as involving “temporary price changes....” AT&T at 37; *see also* MCI at 35

CompTel states at (8-9) that “the Commission should not interpret Section 254(g) to require interexchange carriers to offer each service ubiquitously or even to all locations within a geographic area or state that the provider serves.” It is indeed ironic that in this connection CompTel, so eager to quote the congressional Joint Explanatory Statement (*see* CompTel at 6) somehow missed this portion of the Statement: “[T]he conferees expect that the Commission will continue to require that geographically averaged and rate integrated services, and any services for which an exception is granted, *be generally available in the area served by a particular provider.*” (Emphasis added.) Joint Explanatory Statement at 18. Thus, once a carrier decides to serve a particular area, all services offered in the rest of the carrier’s area must be offered there.<sup>9</sup> CompTel’s concern about new services can be addressed in a section 10 forbearance request.

Equally unconvincing is CompTel’s argument that “Section 254(g) does not require that every option within a service offering employ geographically deaveraged rates, so long as each standard service package is geographically averaged.” CompTel at 8. In truth, every service is an option; nothing in the statute indicates any intention to allow the optional piece parts of services to be deaveraged.

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<sup>9</sup> We agree with GTE (at 15-17) that the 1996 Act is not intended to require that *intrastate* interexchange rates be uniform between states.

AT&T makes two proposals that would effectively eliminate the statutory requirement. First, AT&T flatly states, without explanation, that the statutory forbearance criteria in Section 10 are met if non-dominant carriers are not required to geographically average their rates. *See also* MCI at 28, n. 44. This position should be rejected out of hand by the Commission, because there currently are no dominant interexchange carriers, and there were none at the time of the passage of the Act. As noted before, Congress intended only minor exceptions to the averaging policy to be considered by the Commission. Joint Explanatory Statement at 18. Congress' desire that "rate averaging and rate integration are to ensure that subscribers in rural and high cost areas throughout the Nation are able to continue to receive . . . interexchange services at rates no higher than those paid by urban subscribers" would clearly not be met if only dominant carriers had to average, especially since there currently *are* no dominant carriers of interexchange services. Further, AT&T's proposal to allow deaveraging to meet competitive circumstances (AT&T at 40-42; *see also* MCI at 32) would also deprive rural and high cost customers of the assurance mandated by Congress.

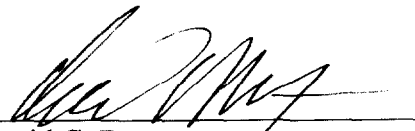
In the NPRM, the Commission raised the question of how it will enforce its averaging rules. It is clear that this question is tied up with the Commission's decision to forbear from following Section 203's tariff filing requirement. OCC will, therefore, discuss the enforcement question in its reply to the comments on Section III of the NPRM.

#### **IV. CONCLUSION**

OCC urges the Commission consider the reply comments made herein, and to adopt the recommendations in these reply comments and in OCC's initial comments.

Respectfully submitted,

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**CONSUMERS' COUNSEL**

  
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#### **CERTIFICATE OF SERVICE**

I hereby certify that the Reply Comments of the Office of the Ohio Consumers' Counsel have been served by overnight mail to the International Transcription Service, and, in diskette form to Janice Myles on this 3rd day of May, 1996.

  
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